IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 21, 2007 Session

STATE OF TENNESSEE v. JAMES SIMONTON

Appeal from the Criminal Court for Sullivan County
No. S48,597 Phyllis H. Miller, Judge

No. E2006-01529-CCA-R3-CD - Filed November 15, 2007

The Appellant, James Simonton, appeals his convictions from the Sullivan County Criminal Court for criminal conspiracy to sell or deliver .5 grams or more of cocaine within 1000 feet of a school and for maintaining a dwelling where controlled substances are used or sold. On appeal, Simonton alleges the following errors: (1) that the evidence presented to the jury was insufficient to support the convictions; (2) that the trial court erred in ruling that his prior convictions would be admissible for impeachment purposes; (3) that the trial court erred by sentencing him as a career offender on the conviction for maintaining a dwelling where controlled substances are used or sold; and (4) that the trial court erred by failing to waive or reduce the $100,000 fine imposed by the jury for the latter conviction. After a review of the record on appeal, Simonton's conviction for maintaining a dwelling where controlled substances are used or sold is affirmed. We conclude, however, that the evidence is legally insufficient to support the conviction for conspiracy to sell or deliver cocaine. Moreover, the fine of $100,000 is modified to reflect a fine of $50,000. Simonton's remaining issues are without merit.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed in Part;
Reversed in Part; and Modified in Part

DAVID G. HAYES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

George Todd East, Kingsport, Tennessee, for the Appellant, James Simonton.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and J. Lewis Combs, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

Throughout November and December of 2003, the Kingsport Police Department Vice Unit and the Second Judicial District Task Force ("DTF") collaborated to investigate reported drug activity outside a residence located at 738 East Sevier Avenue ("the East Sevier property") in Kingsport. The property was owned by the Appellant's younger brother, Don Simonton, and his wife, but they resided in Rogersville. However, the fifty-six-year-old Appellant resided at the property with his invalid mother, who was confined to a wheelchair. The Appellant had lived, with his brother's permission, at the East Sevier property for over ten years.

As part of their investigation, the Kingsport Vice Unit and DTF set up video equipment to monitor daily activity at the East Sevier property, and confidential informants were utilized to visit the property and make controlled purchases of crack cocaine from various men outside the residence. Numerous police officers monitored the East Sevier property, and they all reported similar activities occurring there in November and December of 2003. On a typical day, several men would occupy the driveway or the back yard of the East Sevier property, and various people would walk up to these men and make brief exchanges, sometimes placing small objects in their mouths upon leaving.

The Appellant was arrested for conspiracy to sell or deliver cocaine on December 22, 2003. On September 28, 2005, a Sullivan County grand jury returned a presentment charging the Appellant with one count of criminal conspiracy to sell or deliver .5 grams or more of a substance containing cocaine and one count of maintaining a dwelling where controlled substances are used or sold.

A jury trial began on February 27, 2006. The State's first witness was Officer Bishop, the director of the DTF. Bishop testified that in the fall of 2003, he had received information that a drug transaction had taken place at the East Sevier property. The DTF and Kingsport Vice Unit, working together, began an investigation through the use of confidential informants and surveillance video in November and December of 2003, focusing on the sale of crack cocaine. Bishop testified that he observed numerous individuals walk up to several young men in the driveway of the East Sevier property, "make a quick exchange and leave[,]" and he characterized the foot traffic at this property as heavy during these months. Bishop testified that, from his experience, rocks of crack cocaine are typically transported in the buyer's mouth in case of apprehension by police. He stated that "[a] vast majority of the time the fellows that were in the driveway just hung out in the driveway, they appeared to talk among themselves, sit around on the stoop or in some chairs, fiddled with a car every once in a while but [there] appeared to be no kind of organized labor or work going on." Bishop testified that he observed the Appellant on the property "at times" during this period. On cross-examination, Bishop acknowledged that none of the videos taken at the property showed the Appellant delivering or receiving crack cocaine.

Kimberly Copas, who was incarcerated for robbery and identity theft at the time of trial, provided testimony on the behalf of the State. Copas stated that she was familiar with the Appellant from her experience of purchasing crack cocaine, "[a]pproximately between 75 and 100 times," from about twenty different people outside the East Sevier property during 2003. Copas testified that she never saw the Appellant selling or using drugs but that she saw him "maybe five or ten times . . . standing around, just standing there." Copas recalled that she had been arrested at the East Sevier

property around September 1, 2003. She testified that on the previous day, she had visited the property, purchased drugs outside from a dealer nicknamed "Flipper," and used the drugs inside the residence with the Appellant's brother, William Simonton, a.k.a. "Tansy." Copas testified that after using drugs, she attempted to leave but that Tansy told her to come back inside because she owed money for the drugs. Copas testified that she ultimately "ended up robbing a store to pay for the drugs that [she] had had fronted to [her,] and purchased more drugs." Copas stated that she spent the night at the property and that she saw the Appellant and his girlfriend the next morning getting their children ready for school.

Officer Blessing, a detective for the Kingsport Police Department, testified that he was familiar with the East Sevier property from his prior experience as a patrol officer. Blessing testified that he had spoken to the Appellant several times at the property over the course of at least ten years. Blessing stated that he visited the East Sevier property in early September of 2003, while Kimberly Copas was being arrested by other officers for an armed robbery of a store that morning. Blessing testified that Copas told him that she had hidden money from the robbery under carpet inside the residence located at 738 East Sevier. Blessing testified that he went to the door of the house and told the Appellant that he needed to come inside and retrieve the money, to which the Appellant responded, "[t]hat was fine." Blessing testified that the Appellant never indicated to him that it was not his residence. Subsequently, Blessing obtained the money and left.

Agent Ainsworth, of the First District DTF, testified that he had occasionally worked undercover with other district task forces and police departments throughout the state. Ainsworth testified that he worked with the DTF on November 14, 2003, participating with a confidential informant in a controlled purchase of crack cocaine at the East Sevier property. Ainsworth testified that he and the informant walked up the driveway of the property and were approached by Jermeil Tarter, who sold him $100 worth of crack cocaine. A video of the transaction was shown to the jury. Ainsworth stated that he did not know whether the Appellant was present at the property on this date. Agent Nelson, formerly of the DTF, testified that he parked down the street during this controlled purchase and that Ainsworth had reported back to him with four small rocks of cocaine.

The State next called Kim Crouch, who, at the time of trial, was living at a Christian rehabilitation center for recovering cocaine addicts. Crouch testified that she had a relationship with the Appellant in 1995 and that they had lived together for approximately one year. Crouch stated that the Appellant lived at the East Sevier property when she met him and that it was "a known drug house." She testified that she was released from jail in July of 2003, and that she saw the Appellant at a convenience store in August or September and asked him for some money. Crouch testified that the Appellant handed her fifty dollars. Crouch stated that she visited the East Sevier property later that same day to purchase drugs and that when she approached the back yard of the house, the Appellant, who was standing on the porch, said, "[T]here's a buy." Crouch testified that on this occasion she purchased crack cocaine from Alondo Deshawn Hayes, who was known as "Wheatie." Crouch testified that before she contacted the Kingsport Vice Unit, she had purchased drugs more than once at the location, from both "Wheatie" and Sylvester Bryson, a.k.a., "Bee."

Crouch, who had prior felony convictions for forgery and identity theft, met with Officer Ferguson of the Kingsport Vice Unit in the fall of 2003, in order to "work a deal" on pending drug charges and obtain "fast money." Crouch thereafter agreed to wear a "wire" and make controlled purchases of drugs at the East Sevier property. Crouch further testified that after meeting with Officer Ferguson of the Kingsport Vice Unit, she carried out controlled purchases of crack cocaine from "Bee" at the East Sevier property on November 3, 10, 11, and 13, 2003, which were recorded via video and audio surveillance and shown to the jury. Crouch testified that on November 13, she also spoke with the Appellant, who gave her his phone number and told her to call him within an hour. Crouch later engaged in a recorded phone conversation with the Appellant in which she asked him to speak with dealers about "fatten[ing] up" her crack cocaine purchases, an audio tape of which was played for the jury. Crouch additionally testified that she participated in a controlled purchase from Michael Carnes on November 17, and that, as she was leaving, she saw the Appellant and spoke with him regarding their prior phone conversation. Crouch stated that the Appellant informed her that he was moving from the East Sevier property. On November 20, Crouch testified that she engaged in another controlled purchase of crack cocaine, this time from Alando Hayes, and video and audio recordings of this transaction were played for the jury. On November 24, Crouch again visited the property, and she testified that the Appellant came to the door and informed her "ain't nothing happening" and that he had "one in Knoxville, Atlanta, and North Carolina." The Appellant told Crouch to come back around 4:00 that afternoon. Crouch testified that when she revisited the property at 4:00, she made a controlled purchase of crack cocaine from Kia Williams and Clifton Harrison. Crouch testified that, on December 1, 2003, she again made a controlled purchase of crack cocaine at the East Sevier property, this time from Alando Hayes and Clifton Harrison. Crouch also testified that, on one occasion when she visited the property looking for "Bee," the Appellant came to the door and told her to "come back in [twenty] minutes, Bee's cooking," after which she returned to the property and purchased drugs.

The State's next witness, Officer Ferguson, corroborated Crouch's accounts of the controlled purchases carried out in 2003. Ferguson testified that in December of 2003, when the Appellant was arrested for conspiracy to sell or deliver cocaine, he was not residing at the East Sevier property. Ferguson stated that the Appellant was never found in possession of drugs. He further testified that "[o]n one of the videotapes [the Appellant] was handed money from one of the drug dealers who was out there selling, but to actually take any drug money off of him we did not."

Another witness for the State, Detective Chambers, testified that he had contact with the Appellant in May of 2003, after he and Officer Ferguson had arrested a man in the backyard of the East Sevier property for possession of crack cocaine. Detective Chambers testified that at that time, he told the Appellant "that there was a lot of drug activity there at that location and that he needed do something about it and his response to [Detective Chambers] then was 'I can't control what these guys are doing.'" Chambers stated that the investigation of the East Sevier property began to "heat up" in the fall and early winter months of 2003, with "Bee" being one of the main suspects in the operation. Chambers testified that "Bee" lived in a motor home in a parking lot across the street from the East Sevier property and that he had eventually moved his vehicle to the backyard of the East Sevier property after the police had questioned him and searched the motor home. Chambers

further testified that, around that time, the Appellant told him, "Anytime you want to search my house you come search my house."

At the close of the State's proof, outside the presence of the jury, defense counsel moved for a dismissal of the conspiracy charge, alleging that the State had failed to carry its burden that the Appellant was a party to any agreement to commit a crime. Defense counsel also moved for a dismissal as to the charge of maintaining a dwelling where controlled substances are used or sold, alleging that the State had failed to establish that the Appellant maintained the East Sevier property. The trial court denied both motions.

The sole witness testifying for the defense at trial was Don Simonton, Appellant's younger brother. Don Simonton testified that he and his wife lived in Rogersville and that they had owned the East Sevier property since 1988. He further stated that the Appellant and their mother, who was elderly and confined to a wheelchair, moved back into the East Sevier property after a cooking fire had occurred there in early 2003. Don Simonton testified that he viewed the Appellant's role at the house as caretaker for their mother. He claimed that their mother paid all of the rent on the property, which was applied toward the mortgage payment, and that the Appellant never performed maintenance on the property, paid any of the bills, or performed any repairs on the property. He testified that problems developed between him and the Appellant in the fall of 2003, related to the care of their mother, and that he asked the Appellant to move out of the East Sevier property in the latter part of September or first of October 2003.

The jury convicted the Appellant upon the foregoing evidence. The Appellant waived his right to be sentenced under the sentencing guidelines as they existed at the time the offenses were committed in 2003, opting instead to proceed under the amended guidelines in effect for crimes committed after June 7, 2005. At the sentencing hearing on April 26, 2006, the trial court took note of the Appellant's prior convictions, heard testimony from Officer Ferguson and the Appellant, and discussed the relevant enhancement and mitigating factors. At the conclusion of the hearing, the trial court ordered that the Appellant serve twelve years as a Range I, standard offender for conspiracy to sell or deliver .5 grams or more of cocaine within 1000 feet of a school, a Class B felony, and twelve years as a career offender for maintaining a dwelling where controlled substances are used or sold, a Class D felony. The trial court further ordered that the sentences be served consecutively and that the Appellant be fined $25,000 for count one and $100,000 for count two as fixed by the jury. The Appellant filed a motion for new trial on May 26, 2006, which the trial court denied on June 23, 2006. The Appellant filed a timely notice of appeal.

Analysis

I. Sufficiency of the Evidence

The Appellant argues that the evidence presented by the State was insufficient to support his convictions for conspiracy to sell or deliver .5 grams or more of cocaine within 1000 feet of a school and for maintaining a dwelling where controlled substances are used or sold. Due process requires

that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof, which is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). In our review of the issue of sufficiency of the evidence, the relevant question is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789 (emphasis in original); *see also* Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this court does not re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). Nor may this court substitute its inferences drawn from circumstantial evidence for those drawn by the trier of fact. *Id.* (citing *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *Liakas v. State*, 286 S.W.2d 856, 859 (1956)).

a. Conspiracy to Sell or Deliver .5 Grams or More of Cocaine Within 1000 Feet of a School

The Appellant contends that the State failed to meet its burden of proof in establishing that he was guilty beyond a reasonable doubt of conspiracy to sell or deliver .5 grams or more of cocaine within 1000 feet of a school. The Appellant contends that "the proof presented by the State presented no evidence of a conspiracy involving the defendant." In support of this argument, the Appellant relies upon the fact that, although the property where he resided was the object of extensive video surveillance and intrusions by confidential informants, "not one [video] showed [the Appellant] in possession of or taking part in the purchase, sale or delivery of cocaine." Moreover, the Appellant notes that notwithstanding the two-month surveillance, "[t]he record is void of any testimony, audio recording, or video in which [the Appellant] communicated with any drug dealers in regards to the selling or delivering of cocaine."

Contrarily, the State contends that the evidence was sufficient to support the Appellant's conviction because the evidence supports "the conspiratorial relationship between the [Appellant] and the numerous individuals who sold cocaine from [the Appellant]'s property." The State, relying upon the hours of videotape showing drug transactions perpetrated in the driveway of the East Sevier property by numerous men, submits that this and other circumstantial evidence shows a "mutual implied understanding" sufficient to establish the Appellant's guilt of conspiracy. The State argues that the Appellant, "by allowing the individuals to sell their drugs in his driveway, as opposed to the individuals selling the drugs in the street, assisted the drug dealers in their sale of drugs" and that the Appellant's visible presence on the property during these sales was sufficient to establish an

underlying agreement to sell crack cocaine. The State further relies upon various statements made by the Appellant in November and December of 2003, to criminal informant Kim Crouch and demonstrated by the video and audio recordings presented to the jury at trial, to support its argument that the Appellant promoted the sale of drugs from the East Sevier property.

Our criminal code provides:

> (a) The offense of conspiracy is committed if two (2) or more people, each having the culpable mental state required for the offense which is the object of the conspiracy and each acting for the purpose of promoting or facilitating commission of an offense, agree that one (1) or more of them will engage in conduct which constitutes such offense.[1]
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> . . . .
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> (d) No person may be convicted of conspiracy to commit an offense unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by the person or by another with whom the person conspired.

T.C.A. § 39-12-103(a),(d) (2006).

The Sentencing Commission Comments to Tennessee Code Annotated section 39-12-103 provides the following clarifications:

> Subsection (a) defines conspiracy in terms of an agreement of two or more people to commit an offense. Each conspirator must satisfy two mental elements. First, each conspirator must have the culpable mental state required for the offense that is the object of the conspiracy. For example, a defendant guilty of conspiracy to commit robbery must have the mental state required for the offense of robbery. Second, each conspirator must act for the purpose of promoting or facilitating commission of an offense. Subsection (b) describes the reach of a chain conspiracy.
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> . . . .
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> Subsection (d) alters Tennessee law by requiring an overt act by at least one conspirator before a conspiracy is committed. This requirement assures that the

[1] With regard to the target crime of the conspiracy, "[i]t is an offense for a defendant to knowingly manufacture, deliver, or sell a controlled substance, or for a defendant to possess a controlled substance with intent to manufacture, deliver, or sell such controlled substance." T.C.A. § 39-17-417(a)(1)–(4) (2006).

> conspiracy is more dangerous than a mere agreement. It also protects against erroneous convictions based solely on the exchange of words. Prior Tennessee law required an overt act for most, though not all, offenses. See prior § 39-1-602.
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> . . . .

Thus, the plain language of the statute requires proof beyond a reasonable doubt (1) that the indicted conspirator has entered into an agreement with one or more people to commit a crime; (2) that each of the conspirators has the culpable mental state required for the offense which is the subject of the conspiracy; (3) that each must have the purpose of promoting or facilitating the offense which is the subject of the conspiracy; and (4) that one or more of them will engage in conduct which constitutes the crime. T.C.A. § 39-12-103(a).

In order to prove a conspiracy, "it is not necessary that the State show a formal agreement between the parties to do the unlawful act, but a mutual implied understanding is sufficient . . . ." *State v. Carter*, 121 S.W.3d 579, 589-90 (Tenn. 2003) (quoting *Randolph v. State*, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978)). Furthermore, "[t]he unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the execution of the criminal enterprise." *Id.* at 590. Nonetheless, "while 'a conspiracy is seldom born of open covenants openly arrived at,' . . . there must be proof of a '[c]ommon purpose and plan,' to prove that a defendant has joined in a conspiracy." *United States v. Alvarez*, 610 F.2d 1250, 1256 (5th Cir. 1980).[2] "Conspiracy" involves the element of agreement, evidenced by the existence of a single design for the accomplishment of the common purpose. *Id.* Moreover, there must be a combination by concerted action to accomplish an unlawful result. *Schmeller v. United States*, 143 F.2d 544, 549 (6th Cir. 1944). "Mere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose." *Solomon v. State*, 76 S.W.2d 331, 334 (Tenn. 1934); *see also United States v. Grassi*, 616 F.2d 1295, 1301 (5th Cir. 1980) ("It is a cardinal rule of conspiracy law that one does not become a co[-]conspirator simply by virtue of knowledge of the conspiracy and association with conspirators."). In stating the rule applicable to criminal convictions based upon circumstantial evidence, this court has held:

> The law is firmly established in this State that to warrant a criminal conviction upon circumstantial evidence alone, the evidence must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude

[2]The federal conspiracy statute, 18 U.S.C. § 371, and particularly the provision relating to the requirement of an agreement between two or more persons, is consistent with this state's conspiracy statute. Accordingly, we cite to federal case law decisions as persuasive authority.

> every other reasonable theory or hypothesis except that of guilt, and it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that he is the one who committed the crime.

Pruitt v. State, 460 S.W.2d 385, 390 (Tenn. Crim. App. 1970).

> The conspiracy count in this case charged, in relevant part, that the
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> [Appellant] . . . , Alondo Deshawn Hayes . . . , Sylvester Bryson . . . , Michael Jackson Carnes . . . , Kai T. Williams . . . , Brent Blye . . . , Jermeil Ralph Tarter . . . , Clifton "Ky" Harrison . . . , each being a party to the offense with each other and with other persons both in Tennessee and out of Tennessee whose names are to the Grand Jury unknown . . . did unlawfully, feloniously and knowingly agree that one or more of them would engage in conduct which constituted the offense of sale and, or delivery of 0.5 (five-tenths) gram or more of a substance containing Cocaine, a Schedule II Controlled Substance . . . and [each] did . . . intentionally act for the purpose of promoting or facilitating the commission of the said offenses and as a result of the conspiracy, an overt act was committed in furtherance of the conspiracy . . . .

After review of the record, we are unable to conclude that the State established that an agreement, expressed or implied, existed between the Appellant and any named or unnamed co-conspirator, wherein one or more of them, "acting for the purpose of promoting or facilitating" the sale or delivery of illicit drugs, agreed that one or more of them would engage in the unlawful sale or delivery of cocaine, as charged in the presentment.

Although the State asserts that "it is clear from the evidence that the [Appellant] knew what was going on[,]" and we agree, we are mindful of the principle that "[m]ere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy." *Solomon*, 76 S.W.2d at 334. The State further asserts that although no one saw the Appellant possess or sell illicit drugs, "under a theory of criminal responsibility, the [Appellant] was a party to each offense that occurred at 738 East Sevier Avenue because he aided or assisted the sale of drugs." However, the State's reliance upon criminal responsibility based upon the conduct of another is misplaced. The core requirement of every conspiracy is an agreement. To impute criminal responsibility based upon a co-conspirator's conduct, in the absence of any form of an agreement would in effect, negate the requirement of a requisite culpable mental state for the conspiracy and the requirement of "the existence of a single design for the accomplishment of the common purpose." *Alvarez*, 610 F.2d at 1256. To restate the language of *Solomon*, [t]here must be intentional participation in the [illegal] transaction with a view to the furtherance of the common design and purpose." 76 S.W.2d at 334.

In this case, the facts simply do not establish "a mutual implied understanding" between the Appellant and his alleged co-conspirators to sell crack cocaine. *See Carter*, 121 S.W.3d at 589-90. The circumstantial evidence relied upon by the State for the conspiracy conviction fails to "exclude every other reasonable theory or hypothesis except that of guilt," nor does it "establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that he is the one who committed the crime." *See Pruitt*, 460 S.W.2d at 390. Of central importance, the record is absent proof that the Appellant and each of the conspirators were acting in concert and with the common purpose of promoting or facilitating the sale or delivery of cocaine. As such, we are unable to conclude that the proof established the elements for conspiracy to sell or deliver .5 grams or more of cocaine within 1000 feet of a school beyond a reasonable doubt. Accordingly, we reverse the conviction of the Appellant for this offense.

b. Maintaining a Dwelling Where Controlled Substances are Used or Sold

The Appellant also challenges the sufficiency of the evidence underlying his conviction for maintaining a dwelling where controlled substances are used and sold. He contends that it was established at trial that his brother, Don Simonton, owned the East Sevier property. The Appellant additionally argues that his brother's testimony at trial supports his own contention that he contributed nothing to the maintenance of the property, be it through payment of the mortgage, payment of rent, payment of utility bills, or aiding in repairs or upkeep for the property. The Appellant urges this court to assign a "common and ordinary meaning" to the word "maintain," which he asserts "requires more than simply residing on the property." Utilizing such a definition, he asserts that his conviction cannot stand.

The offense at issue is codified in Tennessee Code Annotated section 53-11-401(a)(5) and is part of the Tennessee Drug Control Act of 1989. *See* T.C.A. § 39-17-401 (1997). The statute sets out some of the crimes and penalties of the Act and provides, in pertinent part, as follows:

> (a) It is unlawful for any person:
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> . . . .
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> (5) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is resorted to by persons using controlled substances in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4, for the purpose of using these substances, or which is used for keeping or selling them in violation of parts 3 and 4 of this chapter or title 39, chapter 17, part 4.

T.C.A. § 53-11-401(a)(5); *see also State v. Laura Starkey and Traeton McCoy*, No. M2005-02896-CCA-R3-CD (Tenn. Crim. App. at Nashville, May 2, 2007). A violation of this section is a Class

D felony. T.C.A. § 53-11-401(b)(1). In analyzing the predecessor to this statute, in *Moore v. State*, this court held that in contrast to certain other provisions of the statute, subsection (a)(5) applies to any person, not only to persons subject to registration provisions. *Moore v. State*, 568 S.W.2d 632, 634 (Tenn. Crim. App. 1978; *see also State v. Laura Starkey and Traeton McCoy*, No. M2005-02896-CCA-R3-CD.

In the recent decision of *Laura Starkey and Traeton McCoy*, No. M2005-02896-CCA-R3-CD, this court was faced with a similar argument by parties appealing their convictions for maintaining a dwelling used for keeping or selling methamphetamine. In that case, responding to the appellants' arguments that their lack of an ownership interest in the house at issue precluded their convictions under Tennessee Code Annotated section 53-11-401(a)(5), we applied a plain language construction of the statute and concluded that ownership of the property was not a prerequisite to conviction. *Id*. We construed the statute to require, however, a showing that a defendant "continuously exercised some authority or control over the property for an appreciable period of time." *Id*. We further stated:

> While proof of residency is a significant factor to consider, that factor alone is not dispositive. Other factors that may be considered include whether the person owned or leased the property; is the only permanent resident in the home; paid any rent, taxes, or utilities; took part in the home's maintenance or upkeep; or provided furnishings for the home.

Id. Despite the fact that the defendant Starkey knew that methamphetamine was being made in the house and that she may have used the drug, this court concluded that the State's evidence against her, under the totality of the circumstances, was inadequate to show that Starkey did "keep or maintain" the home as required by the statute. *Id.* As to the defendant McCoy, we discussed the evidence supporting his conviction as follows:

> The State also failed to present any proof that McCoy owned or leased the property; paid rent, taxes, or utilities; took part in the home's maintenance or upkeep; or provided furnishings for the home. However, McCoy told officers that he had been allowing another person to make methamphetamine in the house for the past six months. Moreover, Starkey would telephone McCoy in the evenings to ensure that it was all right for her to come home. Finally, when Sergeant Chisam asked to search the home, McCoy gave permission for the search, never indicating to the officers that he did not have such authority. This evidence is sufficient to show that McCoy continuously exercised some authority over the house and, therefore, did "keep or maintain" the dwelling. *See United States v. Morgan*, 117 F.3d 849, 857 (5th Cir. 1997) (noting that evidence of "supervisory control" over a property is a factor to consider in determining whether a defendant "maintained" the property).

Id.[3]

We conclude that the precedent existing in Tennessee on this issue weighs against the Appellant's argument on appeal. Don Simonton testified that the Appellant moved out of the East Sevier property in late September or early October and that he did not see the Appellant at the property thereafter. However, the record demonstrates that the Appellant continued to occupy the house well beyond this point in time, as supported by his visible presence in surveillance video and the testimony of numerous State witnesses. Although we recognize that proof of residency is not dispositive of a defendant's eligibility for prosecution under Tennessee Code Annotated section 53-11-401(a)(5), the record clearly reflects that the Appellant exercised supervisory control of the East Sevier property. In this case, under the totality of the circumstances, the Appellant's alleged lack of contributions to the property are of little consequence, and we find his arguments to the contrary unpersuasive. Kim Crouch testified that when she visited the property to purchase crack cocaine and no drugs were available, the Appellant told her when to return. After Kimberly Copas was arrested at the East Sevier property in September of 2003, the Appellant gave Officer Blessing consent to search the house and recover money that she had allegedly stolen in an armed robbery. On another occasion, in response to Detective Chambers' questioning him regarding drug activity by "Bee," the Appellant stated, "Anytime you want to search my house you come search my house."

Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this court does not re-weigh or re-evaluate the evidence. *Reid*, 91 S.W.3d at 277. A guilty verdict, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in testimony in favor of the theory of the State. *State v. Hatchett*, 560 S.W.2d 627, 630 (Tenn. 1978). We hold that the record contains sufficient evidence for a reasonable juror to have found that the Appellant "continuously exercised some authority or control over the property for an appreciable period of time" so as to have "kept" or "maintained" a dwelling where controlled substances are used or sold as required by Tennessee Code Annotated section 53-11-401(a)(5). *See Laura Starkey and Traeton McCoy*, No. M2005-02896-CCA-R3-CD. Accordingly, this issue is without merit.

II. Admissibility of Prior Convictions

The Appellant next contends that the trial court committed reversible error by ruling that the Appellant's prior multiple felony "bad check" convictions and a misdemeanor theft conviction would have been admissible for impeachment purposes had he chosen to testify at trial. The Appellant argues that, pursuant to Rule 609(b) of the Tennessee Rules of Evidence, these convictions were

[3] Notwithstanding this analysis of the relevant considerations under the statute, we likewise reversed McCoy's conviction, based upon the trial court's plain error in charging the jury that the defendants could be convicted if it found that they knowingly kept or maintained the home and that the home was utilized to *manufacture*, rather than sell or use, controlled substances. *Id.*

inadmissible at trial because more than ten years had elapsed between his release from confinement and the instant prosecution. While the Appellant concedes that these crimes involved dishonesty, he asserts that the State did not establish that the probative value of these prior convictions substantially outweighed their prejudicial effect. The Appellant alleges that the trial court abused its discretion in deeming the convictions admissible and that this ruling "denied [him] the opportunity to testify in his own defense."

On appeal, this court reviews a trial court's ruling on the admissibility of prior convictions for impeachment purposes under an abuse of discretion standard. *See, e.g., State v. Waller*, 118 S.W.3d 368, 371 (Tenn. 2003); *State v. Thompson*, 36 S.W.3d 102, 110 (Tenn. Crim. App. 2000). A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Waller*, 118 S.W.3d at 371.

In *State v. Morgan*, 541 S.W.2d 385, 388-89 (Tenn. 1976), our supreme court adopted Rule 609 (a) and (b) of the Federal Rules of Evidence, thereby rejecting the old "moral turpitude" criterion for admissibility of convictions to impeach. Tenn. R. Evid. 609, Advisory Comm'n Comments. This court has subsequently articulated the general rule as follows:

> Subject to certain conditions for admissibility, Tennessee Rule of Evidence 609 authorizes the use of proof of a witness's prior convictions in order to attack a witness's credibility. Tenn. R. Evid. 609(a). The prior conviction must be for a felony or a crime involving dishonesty or false statement. Tenn. R. Evid. 609(a)(2). To be *eligible* as an impeaching conviction, a prior *felony* conviction need not involve dishonesty. However, when the witness to be impeached is the criminal defendant, the state must give notice prior to trial of its intent to utilize the conviction for impeachment purposes, Tenn. R. Evid. 609(a)(3), and upon request, the court must determine the admissibility of an eligible conviction by deciding whether "the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues." *Id.* In making this determination, "two criteria are especially relevant." *State v. Mixon,* 983 S.W.2d 661, 674 (Tenn. 1999). First, the court must "analyze the relevance the impeaching conviction has to the issue of credibility" and "explain [the relevance] on the record," *id.,* and second, it must, "assess the similarity between the crime on trial and the crime underlying the impeaching conviction." *Id.* (quoting Cohen, Sheppeard, Paine, *Tennessee Law of Evidence* § 609.9 at 376 (3d ed. 1995)).

Thompson, 36 S.W.3d at 109 (emphasis in original). When an impeaching conviction is substantially similar to the crime for which the defendant is being tried, there is a danger that jurors will erroneously utilize the impeaching conviction as propensity evidence of guilt and conclude that since the defendant committed a similar offense, he or she is probably guilty of the offense charged.

State v. Mixon, 983 S.W.2d 661, 674 (Tenn. 1999). Accordingly, the unfair prejudicial effect of an impeaching conviction on the substantive issues greatly increases if the impeaching conviction is substantially similar to the crime for which the defendant is being tried, and therefore, trial courts should carefully balance the probative value of the impeaching conviction on credibility against its unfairly prejudicial effect on substantive issues. *Id.*

Regarding time limitations on the use of such convictions for this purpose, the Tennessee Rules of Evidence provide as follows:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed between the date of release from confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release. Evidence of a conviction not qualifying under the preceding sentence is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

Tenn. R. Evid. 609(b). Therefore, in order for the convictions falling outside the ten-year window to be admissible for impeachment purposes, the State was required to provide sufficient notice to the Appellant of its intent to so utilize them, and the trial court was required to determine that these convictions' probative value of the convictions, supported by specific facts and circumstances, substantially outweighed their prejudicial effect. *State v. Daniel E. Pottebaum, Sr.*, No. M2004-02733-CCA-R3-CD (Tenn. Crim. App. at Nashville, May 5, 2006); *Thompson*, 36 S.W.3d at 111.

Prior to trial, the State filed a document captioned, "Notice of Intent To Seek Enhanced Punishment And To Inquire About Prior Convictions And Bad Acts If Defendant Elects To Testify." The pre-sentence report reflects numerous bad check convictions from 1986 in Sullivan and Washington Counties, twenty-one of which were felonies, for offenses which the Appellant pled guilty to committing throughout 1984 and 1985. For these convictions, the Appellant received effective suspended sentences of nine years and ten years, respectively, with supervised probation. Although no specific release date is shown for these convictions, the report provides the following probation history for the Appellant:

> [The Appellant] was previously supervised by the Blountville Probation and Parole Office in 1986 for 23 counts of worthless checks in Sullivan County Criminal Court on an effective 9 year sentence. [The Appellant] was also placed on probation on an effective 10 years [sic] sentence in Washington County, Tennessee for several violations of worthless checks on 05/04/1986. [The Appellant] failed to report to probation and absconded. A violation warrant was issued on 08/20/1986. [The Appellant] was arrested on a fugitive from justice warrant in Washington, D.C. on

> 09/30/1986 and returned to Tennessee on 12/22/87 to face the violation charge. [The Appellant]'s probation was revoked on 03/30/1988 and he was ordered to serve his sentence. He was released on parole on that sentence on 08/01/1989 and subsequently that parole was revoked on 09/28/1990. [The Appellant] was again released on parole on 12/01/1990 and again was revoked on 02/17/1994. He then served the remainder of that sentence in Tennessee Department of Corrections [sic].

The pre-sentence report further demonstrates that the Appellant had a prior misdemeanor theft and misdemeanor assault conviction from 1993 and 1996 in Kingsport and an additional three misdemeanor bad check convictions from Maryland in 1987. At trial, outside the presence of the jury, counsel for the Appellant requested that the trial court rule on the admissibility of the aforementioned convictions. After stating its finding that the Appellant's felony bad check convictions and his theft of services conviction involved dishonesty, the court further noted that these convictions bore no similarity to the crimes at issue and found them highly probative on credibility and admissible for impeachment purposes. The Appellant thereafter elected not to testify.

The record suggests that the Appellant's release for his twenty-three bad check convictions in Tennessee occurred sometime after February of 1994. The Appellant was arrested in December of 2003 for the underlying crimes, therefore, it is doubtful that these convictions could be said to have fallen outside of the ten-year period described by Tennessee Rule of Evidence 609(b). Nonetheless, it is clear that under either analysis, the trial court's ruling on this issue would be affirmed. The State complied with the notice requirements set forth by Tennessee Rule of Evidence 609 with regard to the convictions at issue. The record further reflects that the trial court adequately considered the specific facts and circumstances in ruling that the probative value of these convictions substantially outweighed any danger of unfair prejudice to the Appellant. We conclude that the trial court did not abuse its discretion in deeming these convictions admissible for impeachment purposes. Accordingly, this issue is without merit.

III. Sentencing of the Appellant as a Career Offender

The Appellant challenges the sentence entered by the trial court corresponding with his conviction for maintaining a dwelling where controlled substances are used or sold which was twelve years of confinement with a 60% release eligibility date. Specifically, he alleges that the trial court incorrectly classified him as a career offender for this conviction based upon his numerous prior worthless check convictions. The Appellant alleges that, because "only two [of these offenses] were offenses more than $500" the remaining offenses should have been classified as misdemeanors and should not have been utilized by the trial court in calculating his sentence range on the Class D felony.

The issuing or passing of a worthless check is currently punishable as theft, pursuant to Tennessee Code Annotated Section 39-14-105, based upon the amount appearing on the face of the check on the date of issue. T.C.A. § 39-14-121 (2006). Theft is classified as a Class A misdemeanor if the value of the property or services obtained is $500 or less and as a Class E felony if the value

of the property or services obtained is more than $500 but less than $1000. T.C.A. § 39-14-105(1),(2). However, as the State correctly argues, Section 40-35-118 of the Sentencing Reform Act of 1989 provides: "For the purpose of determining the classification of felony offenses in title 39 committed prior to November 1, 1989, the following classifications shall be used" and proceeds to classify former Code section 39-3-301, "Knowingly drawing check or order in excess of $100 with fraudulent intent," as a Class E felony.

The record reflects that the Appellant has a prior criminal record which includes the following offenses for passing a worthless check in excess of $100:

December 10, 1984, Case No. 19474 for $125.00, Sullivan County Criminal Court
August 17, 1985, Case No. 19557 for $125.00, Sullivan County Criminal Court
July 31, 1985, Case No. 19565 for $602.90, Sullivan County Criminal Court
August 10, 1985, Case No. 19547 for $268.77, Sullivan County Criminal Court
August 17, 1985, Case No. 19548 for $796.27, Sullivan County Criminal Court
August 26, 1985, Case No. 19549 for $455.00, Sullivan County Criminal Court
August 17, 1985, Case No. 19550 for $258.60, Sullivan County Criminal Court
July 26, 1985, Case No. 19551 for $283.78, Sullivan County Criminal Court
September 7, 1985, Case No. 19595 for $361.15, Sullivan County Criminal Court
August 10, 1985, Case No. 19554 for $193.90, Sullivan County Criminal Court
August 10, 1985, Case No. 19580 for $155.74, Sullivan County Criminal Court
September 2, 1985, Case No. 19640 for $200.00, Sullivan County Criminal Court
September 1, 1985, Case No. 19641 for $140.00, Sullivan County Criminal Court
August 27, 1985, Case No. 19734 for $352.87, Sullivan County Criminal Court
August 24, 1985, Case No. 19735 for $130.58, Sullivan County Criminal Court

Consequently, because these offenses occurred prior to 1989, and the value of each worthless check exceeded $100, the trial court correctly classified the convictions as Class E felonies. These convictions placed the Appellant in the career offender sentencing range, and the trial court appropriately ordered that he serve twelve years for the Class D felony conviction at a 60% release eligibility date. This issue is without merit.

IV. $100,000 Fine

The Appellant additionally argues that the trial court erred in not waiving or reducing the fine of $100,000 set by the jury for the conviction of maintaining a dwelling where controlled substances are used or sold. He asserts that, during sentencing, the trial court failed to consider his lack of income, lack of assets, and lack of earning potential, when it entered judgment on the conviction for this offense.

"When imposing sentences, after the sentencing hearing, the court shall impose a fine, if any, not to exceed the fine fixed by the jury." T.C.A. § 40-35-301(b) (2003). Any challenge to the amount of the fine imposed by the trial court should be conducted in accordance with the 1989

Sentencing Act. *State v. Bryant*, 805 S.W.2d 762, 767 (Tenn. 1991). The defendant's ability to pay is a factor to consider in establishing the fine, but it is not necessarily a controlling factor. *State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). A court should also consider other factors, including "prior history, potential for rehabilitation, financial means, and mitigating and enhancing factors that are relevant to an appropriate, overall sentence." *State v. Taylor*, 70 S.W.3d 717, 723 (Tenn. 2002).

The Appellant is fifty-six years old and single, and he has an extensive criminal history reflecting both felony and misdemeanor convictions. His employment history reflects numerous jobs over the past forty years, including truck driver, car detailer, and mechanic. The Appellant's educational background indicates that he received his GED while incarcerated. At sentencing, the Appellant testified that he had owned a used car lot but that he lost all of the cars after his arrest, and he presently has no assets. His current ability to pay any portion of the $100,000 fine is unrealistic, and the likelihood for future payment is similarly remote, especially since he is currently serving a twelve-year sentence. Based upon these facts, we conclude that modification is warranted and modify the Appellant's fine to $50,000.

CONCLUSION

Based upon the foregoing, the Appellant's conviction for maintaining a dwelling where controlled substances are used or sold and the resulting twelve-year sentence are affirmed. The Appellant's conviction for conspiracy to sell or deliver cocaine is reversed and dismissed. The fine imposed by the jury of $100,000 is modified to reflect a fine of $50,000.

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DAVID G. HAYES, JUDGE